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IN THE

Supreme Court of the United States

October Term, 1966

No. 294

HARRY LEVY,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Harry Levy prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 31, 1966, affirming the order of the United States District Court for the Southern District of New York entered on September 21, 1965.

Opinions Below

The Court of Appeals for the Second Circuit affirmed the order entered in the United States District Court, Southern District of New York without opinion. The unreported memorandum opinion of the District Court is printed in petitioner's Appendix (pp. 2a-4a) originally submitted on appeal to the Court of Appeals, nine copies of which have been filed with this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Whether the United States District Court erred in making an order pursuant to New York Civil Practice Law and Rules §5226, directing a judgment debtor to make certain payments on account of a judgment, under penalty of imprisonment for failure to comply, in that it made the said order in disregard of the necessary preliminary conditions and safeguards required under the New York statute before such an order may be made?

Statutes Involved

The statutory provisions involved are Rule 69(a) of the Federal Rules of Civil Procedure, and §5226 of the Civil Practice Law and Rules of the State of New York. The text of these provisions are printed in the Appendix, attached hereto, pages 13-14.

Statement

On April 23, 1947, petitioner pleaded guilty to an indictment charging him with a violation of the O. P. S. Laws and Regulations and was sentenced to serve a term of a year and a day, and to pay fines totalling $151,000. Since that time, the petitioner has paid monthly installments of first $40 and then $50 per month to the Office of Probation resulting in a reduction of the amount owed by approximately $12,000.

On August 23, 1965 respondent (hereinafter referred to as the "Government") made a motion in the United States District Court for the Southern District of New York demanding that petitioner be ordered to pay the remaining balance of the judgment in monthly installments of $1,250. This motion was made pursuant to the provisions of §5226 of New York State Civil Practice Law and Rules, as made applicable by Rule 69(a) of the Federal Rules of Civil Procedure. The jurisdiction of the District Court to entertain such a motion is based on 28 U. S. C. §1355.

Although in its original moving papers the Government demanded monthly installments of $1,250, the Government subsequently amended its motion to reduce its demand to monthly installments of $1,000. This reduction resulted from the Government's recognition that monthly payments of $1,250, or $15,000 per year, would have exceeded petitioner's entire yearly net income of $12,500.

The record before the District Court on the Government's motion consisted of the following: (1) the notice of motion, (2) the affidavit of Arch. E. Sayler, United States Chief Probation Officer, (3) the moving and supplemental affidavit of Edward L. Smith, Assistant United States Attorney, (4) a copy of the transcript of an examination in supplementary proceedings of the judgment debtor held on December 4, 1962, (5) the Government's memorandum of law, and (6) the opposing affidavit of the petitioner Harry Levy. The relevant content of the foregoing documents is discussed below in the "Reasons for Granting Writ" section of this petition.

Based on the foregoing record, the District Court in an opinion and order entered on September 21, 1965, granted the Government's motion to the extent of order-

ing petitioner to pay monthly installments of $500 per month or $6,000 per year commencing October, 1965. In so doing the Court concluded that "it is evident that the monthly installment payments by the judgment debtor should be increased". The Court also noted, however, that there were certain "gaps in the proof" that precluded it from making a determination as to the precise amount and exact nature of petitioner's actual income and the extent of his under-compensation by the company for whom he was working. Further, the Court observed that in the absence of specific and particularized data relating to the petitioners' financial position "the Court's evaluation of the pertinent economic factors must reflect approximations and estimates".

The Court of Appeals for the Second Circuit affirmed the order of the District Court without opinion on March 31, 1966.

Reasons for Granting Writ

1. It is settled law that when a Federal Court proceeds, and gives relief under a state statute, it must, as a matter of law, follow the state legislature's declared policy with respect to the enforcement of that statute and its construction as evolved and announced by the courts of that state. *United States* v. *Southern Construction Company,* 229 F. Supp. 873 (1964). A Federal Court may not impose its own policy and conception nor distort the language or spirit of the state statute. *Rybolt* v. *Jarrett,* 112 F. 2d 642 (1940). Thus, the law of interpretation dictates that the Federal Court be bound by the scope and policy of state law regarding executions, garnishments and other financial enforcement procedures. *In Re Barry,* 52 F. Supp. 496 (1943); *Howard* v. *United States,* 125 F. 2d 986 (1942); *Edwards* v. *United States,*

215 F. Supp. 382 (1936). "In any court action pursuant to the statute, the judgment debtor must receive that protection." *Haas* v. *Reiser,* 105 N. Y. S. 2d 98, 102 (1951); *Widder Bros. Inc.* v. *Kaffee,* 19 A. D. 2d 817, 818, 243 N. Y. S. 2d 601, 603 (1963).

2. Because of the "drastic nature" (Wait, Manual of Supplementary Proceedings (1936) p. 593) of the remedy, the New York Courts have established certain standards which must be met before the Court may make an order directing a judgment debtor to make specified payments. We do not refer at this time to the exercise of the Court's discretion in fixing the amount of payments (although as will later appear, they were unreasonable and oppressive in this case) but to the basic facts and findings required before the Court may proceed to grant the motion and exercise its discretion with respect to the amount of the payment. *Widder Bros. Inc.* v. *Kaffee,* 19 A. D. 2d 817, 818, 243 N. Y. S. 2d 601, 603 (1963); *Haas* v. *Reiser,* 201 Misc. 234, 105 N. Y. S. 2d 98, 102 (1951); *Schwartz Tire Corporation* v. *Gershon,* 160 Misc. 439, 440, 290 N. Y. S. 63, 64 (1936); *Adirondack Furniture Corporation* v. *Crannell,* 167 Misc. 599, 601-602, 5 N. Y. S. 2d 840, 843-844 (1938). That these requirements have not been met appears both from an examination of New York cases and from the opinion of the District Court itself.

The amounts involved in any given case are not significant; what is significant is that, if without proper precaution, the Court makes such an order in an amount large or small, it subjects the judgment debtor to the risk of imprisonment. It is for this reason that these standards have been insisted upon.

The judgment creditor in this case (the Government) urged two grounds in support of its application: first,

that the debtor's income as reported by him does not represent the true and fair value of his services but is an evasion, and second, that the amount of income is sufficiently in excess of his personal reasonable requirements and those of his family to justify the payment of his entire income to the creditor. The Court ordered the payment of half his income.

The requirements of the New York cases are clear. Before the Court may make an order directing installment payments, there must be "such evidence before the Court as will leave no doubt that a situation exists as would make the installment order proper". Wait, Manual Supplementary Proceedings (1936), page 593, "The Court is obliged to inquire not only into the income of the debtor but also as to his necessary expenditures and obligations." *Schwartz Tire Corporation* v. *Gershon,* 160 Misc. 439, 440, 290 N. Y. S. 63, 64 (1936). To make such an order without such a sufficiency of proof "would be contrary to the policy" of the State. *Amato* v. *Amato,* 45 N. Y. S. 2d 371, 374 (1943); *McDonnell* v. *McDonnell,* 281 N. Y. 480, 482, 24 N. E. 2d 134, 135 (1939); *Kaplan* v. *Peyser,* 247 App. Div. 660, 663, 288 N. Y. S. 2d 651, 655 (1936); *Adirondack Furniture Corporation* v. *Crannell,* 167 Misc. 599, 601-602, 5 N. Y. S. 2d 840, 843-844 (1938). In *Kaplan* v. *Peyser, supra,* this was stated unequivocally:

> "The question of the sum reasonably necessary for the support of the beneficiary and his dependents is one of fact (citing cases). Testimony of witnesses is necessary where there is dispute as to such reasonable sum. No injustice is likely to occur when the facts are found and reviewed" (at p. 655).

Similar language appears in the *Adirondack* case, *supra.* An examination of all of the cases under this section

shows that almost without exception, the Courts did not act until the matter had been referred to a Referee or it had found some other means of actually hearing testimony upon which it based its decision. The few exceptions involved situations in which there was a default and failure to appear or where the facts were not substantially in dispute. This settled procedure of the New York Courts was not followed by the District Court.

The basic insufficiency of the case appears clearly, not only from an examination of the moving papers, but from the very opinion of the District Court.

As to the Government's contention that the income of the defendant does not represent the true value of his services, we have merely the bare allegation of a probation officer, unsupported by any testimony to indicate what the value of such services should be and to what extent, if any, the defendant's compensation fails to measure up (R. 8a).[1] Although defendant had been reporting regularly to the probation officer and giving all information requested of him, the last figures mentioned by the probation officer to show the size of the business were for the year 1962 (R. 8a), clearly insufficient under the cases for the purpose of making an order at this time. But even that figure related only to the gross sales of the company and nothing more (R. 8a). There was no evidence as to the nature of the business (a small family owned one), the amount of its profits, no evidence, or even mention, of what by industry standards services such as those rendered by the judgment debtor should normally be worth. On the contrary, the record indicates that his salary was very much in accord with current

[1] References to a number preceded by "R" are to pages in petitioner's Appendix originally submitted to the Court of Appeals. Nine copies of this Appendix have been filed with the Clerk of this Court.

going rates. Nothing appears in the moving papers to support the allegation that he is undercompensated.

With respect to his personal needs and those of his family, there is not only a lack of sufficient proof but a complete failure of proof. There is no evidence whatsoever in the moving papers as to the personal needs of the defendant and those of his family, the minimal prerequisite to the making of an order. As a matter of fact, entirely apart from family needs, the Government in a high handed manner demanded defendant's entire income, which rests upon the fantastic notion that he has no needs at all.

The New York Court of Appeals has said (*McDonnell* v. *McDonnell,* 281 N. Y. 480, 482, 24 N. E. 2d 134, 135):

> "It would certainly be contrary to the policy of the State to deprive a man for the benefit of a creditor of income at least sufficient to meet the reasonable requirements for the support and maintenance of himself and of his dependents."

Much of the Government's case is based upon the theory that defendant's wife is not the true owner of the business. If this were true it would be a fact to be considered. But again we have a bare allegation and no facts. Actually on the record, facts appear to the contrary, for not only do the answering papers establish without contradiction that the business is owned by defendant's wife (and it is also uncontradicted that they are and have been on bad terms for years and that his position with her is extremely precarious), but they go further and actually show the source of the funds coming from her private investments and from her family (R. 18a-19a).

There was submitted subsequently by the Government by permission of the Court, an additional paper, namely an examination before trial in supplementary proceedings of the debtor (R. 26a-44a), which to begin with, should not have been considered because it had been conducted in 1962 and was no longer relevant to this proceeding, although actually, it substantiated the defendant.

There was before the District Court merely a series of allegations and conclusions contained in the affidavits of the probation officer without actual evidentiary material. Such evidence as did appear in the case was submitted by the defendant and it remains completely uncontradicted. Even if the Government claims that it disbelieves defendant, that does not create the evidence necessary for the Court's determination.

3. The opinion of the District Court shows error on its face. Thus:

(a) It made no findings whatsoever as to whether defendant was undercompensated, and if so to what extent.

(b) It failed to make any findings whatsoever as to what the financial requirements of the defendant were, to say nothing of his family.

(c) The opinion actually stated that the Court could not do this because of the insufficiency of the papers before it. This appears glaringly in several places in the opinion.

The District Court said:

> "Notwithstanding a considerable amount of financial data produced by both parties, there are certain gaps in the proof that preclude the Court

> from being able definitely to find the precise amount and exact nature of the judgment debtor's actual income and the extent of his under-compensation by Petal Sales Corporation" (R. 3a).

Apart from the fact that there was actually no material financial data at all submitted by the Government but only by the defendant, all of which tended to support his position, we find here the first clear evidence of error, indicating that a decision was made without the necessary submission.

The Court later says:

> "It would seem that the Government has conducted numerous inquiries through the F. B. I., the Internal Revenue Service and perhaps other agencies [as indicated in the record, the Government failed to submit any of this, presumably because it did not support its case]. Similarly the judgment debtor himself is in a position to submit specific and particularized data. In the absence of such data the Court's evaluation of the pertinent economic factors must reflect approximations and estimates" (R. 3a-4a).

This is unsupportable under the New York decisions, which are unanimous in rejecting approximations and estimates and requiring something close to certainty before an order will be made.

Again during the course of the opinion the District Court said:

> "The present order is without prejudice to the right of either party to move to increase or reduce the amount named herein, upon papers pre-

> senting specific and particularized facts demonstrating the propriety of a modification of the within order. The court emphasizes the need for the submission of precise, documented financial data in the event either party, if so advised, desires to move for a modification" (R. 3a).

What the Court blandly says is, that if the parties come in to modify the order in order to make it realistic, they must do so by presenting "specific and particularized facts" and it emphasizes "the need for submissions of precise documented financial data".

This is the clearest admission of error, for these things which the Court tells the parties they must present in order to permit proper consideration on a motion for modification, are the very things which were required upon the making of the motion in the first instance, without which the Court had no right to act. The Court does not save its face or the situation, as it obviously tried to do, by saying that either party may later move to modify. In the first place it comes perilously close to saying that, in the absence of proof to justify a proper order, the Court would make the order anyway and compel the parties to come in later to produce necessary proof, if any.

In any event, it is the Government's failure of proof which is before us; the defendant could have little to add, and it seems almost certain that the Government will not come in with a request to modify this extravagant order which goes beyond anything which it could have expected.

In addition, although this is not the main point of this application for certiorari, the papers indicate clearly that the order was a brutal one which makes it impos-

sible for the defendant to exist. Not only is that contrary to the public policy of the State, *McDonnell* v. *McDonnell*, 281 N. Y. 480, 482, 24 N. E. 2d 134, 135 (1939), but it imposes upon him the threat of imprisonment without just cause.

The purpose of §5226 of the Civil Practice Law and Rules is to afford relief to creditors, not to be used as an instrument of punishment as appears to have been done here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE MOSS,
Counsel for Petitioner.

APPENDIX

Rule 69 of the Federal Rules of Civil Procedure (28 U. S. C.):

"Execution

"(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held."

§5226 of the Civil Practice Law and Rules (New York):

"Installment payment order

"Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. No-

tice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered."